

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHAUNTELLE MONIQUE NELSON,
Appellant.

No. 2 CA-CR 2013-0318
Filed April 14, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Gila County

No. S0400CR201200157

The Honorable Robert Duber II, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

STATE v. NELSON
Decision of the Court

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 In this appeal from the trial court's order granting the state's motion to modify probation, appellant Chauntelle Nelson contends the court's order violated due process and was not supported by sufficient evidence. Because we find no error, we affirm.

¶2 Pursuant to a plea agreement, Nelson was convicted of possession of marijuana. The trial court suspended the imposition of sentence and placed Nelson on a twenty-four month term of probation. Included in the conditions of her probation was that she not consume or possess any alcohol and that she pay restitution, fines, and fees as ordered.

¶3 In June 2013, the state filed a petition to modify Nelson's probation, asking the court to order her to serve sixty days in jail as a modified condition of probation, stating that Nelson was "delinquent on her court-ordered financial obligations," had gambled in March 2013, and had consumed alcohol in May 2013. After a hearing on the petition, the court found the state had produced insufficient evidence to conclude Nelson had gambled, but found Nelson had consumed alcohol and she "had the resources to make payments when required" but had failed to do so "before the filing of the Petition to Modify." As a consequence, it ordered Nelson to be remanded into custody for ten days.

¶4 On appeal, Nelson first argues the trial court erred in ruling she had violated her probation because "she was current on her payments" for her court-ordered fines and fees. We review a trial court's decision to modify or revoke probation for an abuse of discretion. *See Green v. Superior Court*, 132 Ariz. 468, 470-71, 647 P.2d

STATE v. NELSON
Decision of the Court

166, 168-69 (1982). “An ‘abuse of discretion’ is discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.” *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993), *quoting Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

¶5 At the modification-of-probation hearing, Nelson’s probation officer, Denice Bondurant, testified that after being placed on probation in November 2012, Nelson had made only two payments, totaling \$150, on her fines and fees before the petition to modify was filed in June 2013. She was supposed to pay “\$100 or more” per month. But, Bondurant testified, “she had found money to gamble with in March 2013” and to “consume[] alcohol in May 2013.” She also testified Nelson had not “made any attempt to obtain employment.” Bondurant acknowledged Nelson had paid \$300 on June 4, the day after the petition to modify was filed, and had handed her \$150 on the day of the hearing, bringing her current on her fines and fees. Bondurant also testified that Nelson had tested positive for alcohol use.

¶6 In support of her claim that the trial court erred in modifying the terms of her probation to include ten days in jail, Nelson cites *State v. Davis*, 159 Ariz. 562, 769 P.2d 1008 (1989), and *State v. Wilson*, 150 Ariz. 602, 724 P.2d 1271 (App. 1986), both of which address a court’s revoking probation based on a failure to pay court-ordered obligations. She maintains that, “[b]y analogy,” to modify the terms of probation, a court must make the same inquiry into the reasons for non-payment that is required to revoke probation.

¶7 But a court may modify the terms of probation “for reasons that may not otherwise warrant revocation of probation.” *Green*, 132 Ariz. at 470, 647 P.2d at 168. And, in any event, Bondurant testified Nelson had made no efforts to gain employment, which “may reflect an insufficient concern for paying the debt” and was some evidence that Nelson had willfully failed to pay. *Beardan v. Georgia*, 461 U.S. 660, 668 (1983). And, as soon as the petition to modify was filed, Nelson was able to bring the payments current, evidencing some ability to pay. Furthermore, to the extent

STATE v. NELSON
Decision of the Court

Nelson argues “there wasn’t a violation of paying fines and fees” because she was current at the hearing, she was required to pay monthly and nothing in the record indicates she did so.

¶8 Additionally, Nelson’s failure to pay was not the only violation the trial court found; it also found she had violated a term of her probation by consuming alcohol. Thus, Nelson’s failure to pay was not the only basis for the modification. *Cf. Wilson*, 150 Ariz. at 605, 724 P.2d at 1274 (reversal not required when court failed to inquire into reason for failure to pay when other grounds for revocation also found).

¶9 Nelson argues, however, that the record contains insufficient evidence that she had used alcohol, citing Rule 27.8(b)(3), Ariz. R. Crim. P. A trial court retains the authority to modify or clarify any condition or regulation of probation at any time prior to absolute discharge upon appropriate notice. Ariz. R. Crim. P. 27.3 (governing modification of probation). The court is also given wide discretion to modify the terms of probation “for any reasonable reason.” *Burton v. Superior Court*, 27 Ariz. App. 797, 800, 558 P.2d 992, 995 (1977). Due process, however, “requires that a probationer be afforded notice and an opportunity to be heard on any material modification of the terms of probation.” *Nieuwenhuis v. Kelly*, 164 Ariz. 603, 606, 795 P.2d 823, 826 (App. 1990), *disagreed with on other grounds by State v. Bradley*, 175 Ariz. 504, 858 P.2d 649 (1993). The evidence presented at that hearing “must establish a reasonable basis for the modification and, if an additional burden is imposed, it must be shown that the probationer violated his or her probationary terms.” *Id.* By suggesting the trial court was required to follow Rule 27.8(b)(3), which pertains to revocation of probation, in this modification proceeding, Nelson essentially asks this court to graft case law addressing rights in a probation revocation proceeding onto a probation modification. We decline that invitation.

¶10 At the modification hearing, Bondurant testified that the out-of-county probation officer who was monitoring Nelson on a day-to-day basis had administered a test for alcohol, and Bondurant expressly testified the test had been positive. And Nelson has not cited any authority that hearsay evidence is not admissible in

STATE v. NELSON
Decision of the Court

probation modification proceedings, nor did she object to the testimony below. Because the record discloses a reasonable basis on which the trial court could conclude Nelson had violated the terms of her probation, both by failing to regularly pay her obligations and by using alcohol, the modification was justified. Thus, we cannot say the court erred in granting the state's petition.

¶11 The trial court's order modifying the conditions of Nelson's probation is affirmed.